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Supreme Court, U.S.
FILED

No. 99 298 AUG 2 1999

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In The

SUPREME COURT OF THE UNITED STATES

JEFF BRYANT,

Petitioner,

v.

GOLDEN FLAKE SNACK FOODS, INC. and LIBERTY MUTUAL INSURANCE CO.

Respondents

and

WILLIAM GUNTER,

Petitioner,

v.

CITY OF BELLEVIEW and FLORIDA LEAGUE OF CITIES,

Respondents

On Petition for Writ of Certiorari To
The District Court of Appeal, First District
State of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the restriction of admissible medical testimony to physicians approved by the adverse party or approved by the administrative judge so restricts the medical evidence available to an injured worker under Florida's Workers Compensation Statute as to violate the due process and equal protection clauses of the Fourteenth Amendment to the U. S. Constitution, and the redress of grievances clause of the First Amendment to the U. S. Constitution?

2. Whether the unfettered discretion of the Governor to appoint and dismiss administrative judges under Florida's Workers Compensation Law denies the injured worker an independent adjudicator in violation of the due process and equal protection clauses of the Fourteenth Amendment to the U. S. Constitution, and the redress of grievances clause of the First Amendment to the U. S. Constitution?

3. Whether the systematic reduction in available benefits for injured workers has rendered Florida's Workers Compensation Law an illusory substitute for the constitutional rights of access to courts in violation of the First and Fourteenth Amendments to the U. S. Constitution?

LIST OF PARTIES

The names of all parties appear in the caption on the cover page.

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OPINIONS BELOW

As to Petitioner Bryant, the Order of the Judge of Compensation Claims, Jonathan D. Ohlman, dated March 10, 1998, is unpublished, and appears at Appendix A.

On appeal to the First District Court of Appeal for the State of Florida, a per curiam decision rendered on April 1, 1999, is unpublished, but reported at 732 So.2d 1071. That opinion appears at Appendix B. The denial of rehearing, dated May 3, 1999, also unpublished, appears at Appendix C.

As to Petitioner Gunter, the Order of the Judge of Compensation Claims, Jonathan D. Ohlman, dated March 5, 1998, is unpublished, and excerpts appear at Appendix D.

On appeal to the First District Court of Appeal for the State of Florida, a per curiam decision rendered on April 12, 1999, is unpublished, but reported at 732 So. 2d.1073. That opinion appears at Appendix E. The denial of rehearing, dated May 4, 1999, also unpublished, appears at Appendix F.

BASIS OF JURISDICTION

As to Petitioner Bryant, the Order of the First District Court of Appeal, State of Florida, denying rehearing is dated May 3, 1999.

As to Petitioner Gunter, the Order of the First District Court of Appeal, State of Florida, denying rehearing is dated May 4, 1999.

Pursuant to the revision of the Florida Constitution in 1980, the Florida Supreme Court no longer has jurisdiction for common law certiorari. Article V, § 3, Fla. Const.(1980). Accordingly, the First District Court of Appeal constitutes

the highest state court in which a determination can be obtained.

Petitioners assert jurisdiction under 28 U.S.C. § 1257 in that Petitioner's federal constitutional rights were necessarily adjudicated in the decisions below.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following provisions of the United States Constitution:

> The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office. (Article III, § 1, U. S. Const.)
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (Amend. I, U. S. Const.)
>
> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Amend. XIV, § 1, U.S. Const.)

There are references to the following provisions of the Florida Constitution:

> All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty,.... (Art. I, § 2, Fla. Const.)
>
> No person shall be deprived of life, liberty or property without due process of law, ... (Art. I, § 9, Fla. Const.)
>
> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay. (Art. I, § 21, Fla. Const.)
>
> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein. (Art. II, § 3, Fla. Const.)

The following federal statute is the basis of jurisdiction for the filing of the Petition herein:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or

> the treaties or statutes of, or any commission held or authority exercised under, the United States. [28 U.S.C. § 1257(a)]

The Florida Statutes involved in this case are lengthy and are therefore reproduced in the Appendix. They are:

§ 440.02(21), Fla. Stat. (1989)

§ 440.02(27), Fla. Stat. (1998 Supp.)

§ 440.13(1)(j), Fla. Stat. (1994 Supp.)

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§ 440.45, Fla. Stat. (1994 Supp.)

§ 440.45, Fla. Stat. (1998 Supp.)

STATEMENT OF THE CASE

The issues raised by both Petitioners are identical and are presented in this joint petition under this Court's Rule 12.4.

Petitioner Bryant sought benefits for an on-the –job injury and accordingly filed a claim for benefits under Florida's workers' compensation system, and ultimately had a hearing on September 9, 1997, before the Hon. Jonathan Ohlman, Judge of Compensation Claims. Petitioner sought to introduce medical testimony of doctors who had not been authorized pursuant to § 440.13 (5)(e), Florida Statutes (1994 Supp.) and that testimony was not allowed. Petitioner's counsel contended at that point that § 440.13 (5)(e) was unconstitutional, but the Judge of Compensation Claims noted that he did not have the authority to rule on the constitutionality of the statute, so the testimony was not allowed and Petitioner was denied benefits. (Appendix A-2)

On appeal to the First District Court of Appeal for the State of Florida, Petitioner contended that § 440.13(5)(e) was unconstitutional in that it denied him access to the courts as provided in Art. I, § 21 of the Florida Constitution, denied him due process pursuant to Art. I, § 9 of the Florida Constitution, and denied him equal protection of the laws pursuant to Art. I, § 2 of the Florida Constitution. (Appendix G).

Petitioner also contended on appeal, but not before the Judge of Compensation Claims, that § 440.15, Florida

Statutes (1994 Supp.) dealing with benefits available under workers compensation, also violated Article I, § 2 and Article I, § 9 of the Florida Constitution. Moreover, Petitioner also asserted that § 440.45, Florida Statutes (1994 Supp.) which gave the power of appointment of Judges of Compensation Claims to the Governor, constituted a violation of the separation of powers of Art. II, § 3 , and of the due process provisions of Art. I, § 9, Florida Constitution.

On appeal to Florida's First District Court of Appeal, the Order of the Judge of Compensation Claims was per curiam affirmed without written opinion (Appendix B) and Petitioner's Motion for Rehearing was denied on May 3, 1999. (Appendix C)

Petitioner Gunter likewise filed a claim for benefits under Florida's workers compensation system and ultimately had a hearing on October 23, 1997, before the Hon. Jonathan Ohlman, Judge of Compensation Claims. Petitioner had filed a claim for a psychiatric independent medical examination(IME) but did not bring before the judge a motion to have that done. When the Petitioner offered the testimony of the psychiatrist, on the basis of § 440.13(5)(e), Fla. Stat. (1994 Supp.) the testimony was not allowed. (Appendix D-2)

On appeal to the First District Court of Appeal for the State of Florida, Petitioner contended that § 440.13(5)(e) was unconstitutional because it denied him access to the courts pursuant to Article I, § 21 of the Florida Constitution, denied him due process pursuant to Article I, § 9 of the Florida Constitution, and denied him equal protection of the laws pursuant to Article I, § 2 of the Florida Constitution. (Appendix H)

Petitioner Gunter likewise on appeal, but not before the Judge of Compensation Claims, contended that § 440.15, Florida Statutes (1994 Supp.) as to benefits available under workers compensation, also violated Article I, § 2 and Article I, § 9 of the Florida Constitution. Moreover,

Petitioner also asserted that § 440.45, Florida Statutes (1994 Supp.) giving the power of appointment of Judges of Compensation Claims to the Governor, was a violation of the separation of powers of Article II, § 3, and of Article I, § 9, of the Florida Constitution..

The First District Court of Appeal issued a per curiam affirmance without opinion (Appendix E) and rehearing was denied on May 4, 1999. (Appendix F).

This Petition for Certiorari is timely filed to seek review of federal constitutional issues which were inextricably intertwined and therfore necessarily adjudicated by the state court below, pursuant to District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

REASONS FOR GRANTING THE PETITION

This case addresses the constitutional rights of injured workers who have had their access to courts for civil remedies extinguished by workers compensation statutes. Generally, the substitute of the statutory remedy for the common law remedy has been approved by the courts. See, Mclean v. Mundy, 81 So.2d 501 (Fla. 1955)

Recent amendments to Florida's Workers Compensation law have: (1) restricted admissibility of medical evidence available to the injured worker; (2) reduced the independence of the administrative law judges; (3) reduced available wage-loss benefits by more than 95% of what was available a mere ten years ago. Thus, this case presents the question whether the statutory remedy is no longer an adequate remedy to be substituted for the workers' rights to redress in court. The statutory remedy has become so restricted that it runs afoul of the fundamental rights of redress of grievances, due process of law and equal protection of the law.

This Court has held in City of Cleburne v. Cleburne Living Center , 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d

313(1985) that "..the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." (105 S.Ct. 3249, 3254) But the Court went on to say in Cleburne that the general rule is changed where the classification interferes with a fundamental right, and that an equal protection analysis requiring strict scrutiny is substituted for that general rule. Id., 105 S.Ct. 3249, 3255

THE RESTRICTION OF MEDICAL TESTIMONY:

Sections 440.13(1)(j), 440.13(2)(c), 440.13(3)(a), 440.13(5)(a), 440.13(5)(e) and 440.13(5)(f), Florida Statutes (1994 Supp.) are set out in Appendix J.

Section 440.13(5)(e) restricts medical testimony to three classes: (a) a medical advisor appointed by the judge; (b) an independent medical examiner(IME); or (c) a physician authorized by the insurance carrier. (Appendix J-3). Thus, the only medical witness which can be selected by the injured worker is the IME. Sections 440.13(1)(j) and 440.13(5)(a) give the illusion that either party (the injured worker or the insurance carrier) can select an IME physician. (Appendix, J-1, J-2) The reality, however, is that only the insurance carrier actually pays physicians (§ 440.13(2)(c), (Appendix, J-1)and no sensible physician will examine a workers compensation patient without prior approval from the insurance carrier. (§ 440.13(3)(a), Appendix , J-2). Thus, the only medical testimony admissible must come from a physician approved by the insurance carrier, or ordered by the judge after an adversary hearing.

The insurance carrier has free rein to make approval of the worker's selected IME physician a drawn-out and costly affair, inasmuch as the worker may not be reimbursed for attorney's fees incurred in overcoming the insurance carrier's opposition. (§ 440.13(5)(f), Appendix, J-3)

It is difficult to imagine a more one-sided contest. In a proceeding to contest the insurance carrier's refusal to authorize certain medical treatment, the only way a claimant can obtain medical testimony is to have his IME approved by the adverse party or to obtain the judge's approval after a contested hearing. And for this illusory statutory remedy, the worker was deprived of his common law right to seek redress in a court of law.

Such a tilt of the playing field violates the right of access to the courts for redress under the First Amendment to the U. S. Constitution and under Article I, § 21 of the Florida Constitution.

By the same token, permitting a claimant to present testimony only by physicians approved by the adversary or ordered by the judge violates the due process clause of the Fourteenth Amendment to the U. S. Constitution and Article I, § 9 of the Florida Constitution. There is certainly no "fair opportunity to be heard" when the adverse party must approve one's witness.

And why is the burden imposed on only one class of litigants, the injured worker? What possible legitimate state interest could require restricting access to qualified medical practitioners, either for treatment or for testimony? The end result of this scheme is clear. If an injured worker claims entitlement to treatment by an acupuncturist, and the insurance carrier opposes it, an acupuncturist cannot even testify at the hearing on whether such treatment will be ordered by the judge. In no other adversary proceeding is the access to evidence so restricted. There is no legitimate state interest to be served, only the interests of the insurance carriers. This statute violates the equal protection clause of the Fourteenth Amendment to the U. S. Constitution and Article I, § 2 of the Florida Constitution.

THE INDEPENDENCE OF THE ADJUDICATOR:

Section 440.45, Florida Statutes (1994 Supp.), is set out in Appendix J. The Florida Governor may select an administrative Judge of Compensation Claims (hereafter "JCC") from a list of three provided by the nominating commission, or, pursuant to § 440.45(2)(c), the governor may decline to select from the three candidates, demanding three different candidates. (Appendix, J-4). Once appointed, a JCC serves a four year term unless removed by the governor "for cause", a term nowhere defined in the statute. Clearly, a JCC who approved too many IME requests by injured workers could legally be removed "for cause" if the governor felt so many IME approvals was "encouraging needless litigation" by injured workers seeking additional treatment.

To exacerbate the problem, a JCC who has served a satisfactory term is no longer entitled to automatic renomination, as specified in § 440.45(2)(c). The Florida Supreme Court has ruled that the legislature cannot fetter the governor's discretion to appoint executive branch administrative judges like the JCCs. Jones v. Chiles, 638 So. 2d 48(Fla. 1994). The governor may now completely ignore the nominating commission's evaluation of the JCC and demand a list of three new applicants. (§ 440.45(2)(c), Fla. Stat., 1998 Supp., Appendix K-3)

And who benefits from such unfettered discretion? Is it the injured worker who is out of work, fighting with the insurance carrier over lost wage benefits and medical treatment? Or is it the well-heeled insurance companies who can afford lobbying organizations and large contributions to the governor, his party, and those legislators who support the governor's policies? Under this statutory scheme, any JCC who is too sympathetic to the plight of injured workers is subject to political removal by a governor who tires of hearing complaints from wealthy insurance companies.

This statute violates the access to courts for redress in the First Amendment to the U. S. Constitution and Article I, § 21 of the Florida Constitution. The worker's right to go before an independent judge in a court of law has been extinguished and replaced with an adjudicatory system where the "impartial adjudicator" must be forever mindful of the political forces acting around him, on threat of losing his job on any given day.

An impartial adjudicator has been an essential part of the the concept of "due process" at least since the adoption of Article III, § 1 of the U. S. Constitution, which provides for lifetime tenure and no reduction in compensation during that service. Making the JCCs' tenure hostage to the political whims of the very insurance companies whose cases they try violates the due process clause of the Fourteenth Amendment and Article I, § 9 of the Florida Constitution.

And what other injured parties are required to place their claims against an insurance carrier before an adjudicator who serves at the political whims of the insurance industry? What possible legitimate state interest would be served by such a loading of the dice? This statute violates the equal protection clause of the Fourteenth Amendment, U. S. Constitution and Article I, § 2 of the Florida Constitution.

THE ILLUSORY REMEDY

The diminution of the wage benefits available to an injured employee within Florida's Workers Compensation system is dramatic.

First, an understanding of how benefits are calculated is essential. The starting point is the claimant's "average weekly wage" (AWW), calculated pursuant to § 440.14, Fla. Stat.(1989), as one thirteenth of the total wages earned in the thirteen weeks immediately preceding the injury. (Appendix, I-2).

However, a major diminution in benefits was accomplished by changing the definition of "wages." That is, the 1989 version of § 440.02(21) defined "wages" as including a significant amount of the fringe benefits customarily provided to employees (and which the employer deducts from his federal income taxes as employee wages). (Appendix I-1). However, the fringe benefits included in this definition of "wages" is severely limited in the 1998 version. § 440.02(27), Fla. Stat. (1998 Supp.) (Appendix, K-1).

When an employee is injured the employer is obligated to pay Temporary Total Disability ("TTD") benefits at the rate of 66 2/3 percent of the AWW. § 440.15(2)(a), Fla. Stat. (1998 Supp.). (Appendix, K-1). Since the AWW is reduced by excluding most fringe benefits from the definition of "wages," the injured worker's TTD benefits are similarly reduced.

However, the most dramatic reduction is the amount of time an employee is eligible for TTD benefits. It is now limited to 104 weeks, § 440.15(2)(a), Fla. Stat. (1998 Supp.). (Appendix, K-1), substantially reduced from the 350 weeks previously established. § 440.15(2)(a), Fla. Stat. (1989). (Appendix, I-2)

In a similar fashion the wage benefits available to an injured worker after reaching "maximum medical improvement" (MMI) have been slashed dramatically. Such benefits were previously calculated as "95% of 85% of the employee's average monthly wage and the salary, wages and other remuneration the employee is able to earn after reaching maximum medical improvement;...." § 440.15(3)(b) 1., Fla. Stat. (1989). (Appendix, I-3).

The 95% of 85% formula was also capped at 66 2/3 % of the AWW. Id. This calculation is now "50% of the employee's temporary total disability benefit". § 440.15(3)(a), Fla. Stat. (1998 Supp.) (Appendix, K-2).

Thus, previously, an injured worker with a $100.00 AWW would receive wage loss benefits at a maximum rate of $66.67 for each week in which he had zero earnings due

to his injury. Now, however, the same worker would receive $33.33 per week (50% of his TTD benefit, which is 66 2/3 % of his AWW).

However, the truly dramatic reduction in benefits is the manner in which the maximum term of wage-loss benefits is calculated. A mere ten years ago, the injured worker could rely on benefits to compensate for his wage losses for 525 weeks. § 440.15(3)(b) 3.c., Fla. Stat. (1989). (Appendix, I-3). Today, the eligibility to recover for lost wages depends not on whether the wages are lost due to the injury, but rather on a sliding scale based upon the permanent impairment rating (PIR) assigned by the treating physician. § 440.15(3)(a)3. The eligibility is 3 weeks for each percentage of PIR. § 440.15(3)(a)3.a, Fla. Stat. (1998 Supp.). (Appendix, K-2).

The magnitude of such a decrease cannot be appreciated unless a sample calculation is performed.

Assume three different workers, each with an AWW of $100.00, has an on-the-job back injury, resulting in spinal disk surgery and a 7% PIR. Workers "A" and "B" are covered by the 1989 compensation formula, but worker "C" is covered by the 1998 formula.

Worker "A" is unable to find employment at all due to the residuals of his back injury, (notwithstanding a proven good faith job search which is a prerequisite to wage loss benefits). Worker "B" is able to find only sedentary employment which pays only $50.00 per week, half his previous AWW. Worker "C" is unable to find any employment at all (also despite a good faith job search).

Worker "A" would be eligible for wage loss benefits of $66.67 per week (as long as he completes an acceptable job search each week) for 525 weeks, a total eligibility of $35,001.75.

Worker "B"'s weekly benefits would be calculated as 95% of the difference between 85% AWW and the present earnings; or .95 [(.85) ($100.00) - $50.00] = .95 [85.00 – 50.00] = .95 [35.00] = $33.25. Worker "B" would be

eligible for wage loss benefits (assuming an acceptable job search each week) for 525 weeks, a total eligibility of $17,456.25.

Worker "C"'s weekly benefit would be calculated as 50% of his TTD benefit (which is 66 2/3 % of his AWW) or $33.33. Worker "B" would be eligible for benefits for a period of three weeks for each percent of impairment, or (3 x 7) ($33.33) = (21) ($33.33) = $699.93.

This represents a total eligibility which is a 96% reduction as compared to Worker "B" and a 98 % reduction as compared to Worker "A".

The remedy available under Florida's Workers Compensation Law is no longer a viable alternative to the common law tort remedy which has been taken away from worker "C". Taking away his constitutional right to access to the courts in exchange for such an illusory remedy is not only offensive to any notion of fundamental fairness, but runs afoul of the First and Fourteenth Amendment guarantees of access to courts, due process of law and equal protection of the law.

FEDERAL CONSTITUTIONAL ISSUES

Petitioners' briefs to the Florida appellate court raised constitutional challenges under the due process, equal protection, and access to courts clauses of the Florida Constitution. The corresponding clauses of the federal constitution are nearly identical in wording and legal effect to those of the Florida Constitution. Thus, the state and federal constitutional issues are inextricably intertwined and the state court ruling would constitute res judicata as to Petitioners' federal claims if review were not sought in this Court. District of Columbia Court of Appeals v. Feldman, 460 U. S. 462 (1983).

The equal protection clause of the Florida Constitution states "All natural persons are equal before the law...." Article I, § 2, Florida Constitution. The equal

protection clause of the Fourteenth Amendment commands that no state shall "...deny to any person within its jurisdiction the equal protection of the laws." Amendment 14, § 1, U. S. Constitution.

The due process clause of the Florida Constitution states, "No person shall be deprived of life, liberty or property without due process of law;...." Article I, § 9, Florida constitution. The due process clause of the Fourteenth Amendment reads, "...nor shall any State deprive any person of life, liberty or property without due process of law;...." Amendment 14, § 1, U. S. Constitution.

Finally, the access to courts clause of the Florida Constitution states, "the courts shall be open to every person for redress of injury and justice shall be administered without sale, denial, or delay." Article I, § 21, Florida Constitution. The First Amendment commands, "Congress shall make no law...abridging...the right of the people...to petition the government for a redress of grievances." Amendment 1, U. S. Constitution. Of course, the First Amendment has been construed by this Court as guaranteeing access to courts for redress of grievances for a minority. NAACP v. Button, 371 U. S. 415, 429-430 (1963). Petitioners assert that they are individual members of an entire class – injured workers – who have been essentially disenfranchised by the State of Florida. Where the Workers Compensation Law once was an acceptable substitute for the workers' common law tort remedies in civil court, it is no longer so. The time has come when the wealth and power of insurance companies and the business community which pays insurance premiums have purchased legislative abrogation of the injured workers' legal rights to access to the courts, without any suitable remedy. Petitioners submit they are representatives of a minority class whose rights have been smothered for the economic benefit of the majority; no less so than the Negro citizens involved in NAACP v. Button, supra.

In Ohio v. Robinette, ____ U.S. _____, 117 S. Ct. 417, _____L.Ed.2d _____(1996) this Court dealt with the issue of jurisdiction in examining an opinion of the Ohio Supreme Court and noted:

> Under Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). When 'a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed the federal law required it to do so. (117 S.Ct. 417, 420 quoting from Michigan v. Long, at 463 U.S. 1032, 1040-1041, 103 S.Ct. 3469, 3472)

The Robinette opinion notes that the Ohio Supreme Court mentioned a section of the Ohio Constitution which was identical to the Fourth Amendment, which relates closely to the situation here with Petitioners Bryant and Gunter. This Court likewise accepted jurisdiction in Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990), where that state court seemed to decide on the basis of a Pennsylvania Constitutional provision that the Pennsylvania court noted offered protection that was identical to that provided by the Fifth Amendment. This Court noted in footnote 4:

> The Superior Court's opinion refers to Art. 1, § 9, of the Pennsylvania Constitution but explains that this provision " 'offers a protection against self-incrimination identical to that provided by the Fifth Amendment.'" 377 Pa. Super., at 386, 547 A.2d, at 421 (quoting Commonwealth v. Conway, 368 Pa. Super. 488, 498, 534 A. 2d 541, 546 (1987). The

decision therefore does not rest on an independent and adequate state ground. See Michigan v. Long, 463 U. S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983). 110 S. Ct. 2638, 2643

See also Pennsylvania v. Labron, ____U.S. ____, 116 S.Ct. 2485, ____L.Ed.2d _____(1996), where this Court found the state laws to be interwoven with the federal, so that jurisdiction for this Court's review was proper. Id., 116 S.Ct. 2485, 2487.

The federal constitutional provisions are so nearly identical to the state constitutional provisions in this case that it is inconceivable that Florida's First District Court of Appeal could have failed to consider federal concepts during deliberation on the due process, equal protection and access to courts issues. Yet, the state court's written opinion ("Per Curiam: Affirmed") does not provide on its face an adequate and independent state law ground. Michigan v. Long, 463 U. S. 1032, 1040-1041 (1983).

CONCLUSION

Based on the authorities cited above and the argument submitted in this Petition, the Writ of Certiorari should be granted as to both of these Petitioners.

Respectfully submitted,

DOUGLAS W. ABRUZZO
Post Office Box 714
Gainesville, FL 32602-0714
(352) 371-9691
Counsel of Record for Petitioners

APPENDIX "A"

Excerpts of Order of Judge of Compensation Claims, Hon. Jonathan D. Ohlman, dated March 10, 1998, as to Petitioner Bryant

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STATE OF FLORIDA
DEPARTMENT OF LABOR AND
EMPLOYMENT SECURITY
OFFICE OF THE JUDGE OF
COMPENSATION CLAIMS
DISTRICT B

JEFF BRYANT,

Claimant,

v.

Claim No. 261-29-2936
D/A 2-14-96

GOLDEN FLAKE and
LIBERTY MUTUAL INS. CO.

Employer

Michael B. Staley, Attorney for Claimant
Mark A. Massey, Attorney for Employer/Carrier

ORDER

Pursuant to due notice of Hearing, this matter came on for hearing before the undersigned at Ocala, Marion County, Florida on Tuesday, September 9, 1997. Present and representing the Employee was Michael B. Staley of Ocala, Florida. Present and representing the Employer/Carrier was Mark A. Massey of Ocala, Florida. With agreement of the parties, final consideration was delayed until February 27, 1998.

***

3.. The initial question is an evidentiary one. The Claimant sought to introduce deposition testimony from Dr. Joel Brooks and Dr. Jose Gaudier, who were the only two medical experts to testify in this case. When the Claimant attempted to introduce medical testimony from the aforementioned witnesses, the E/C raised a timely objection, asserting that neither of the witnesses was qualified to offer medical opinions in light of the limitations set out in Section 440.13(5)(e), Fla. Stat. (1995). The claimant responded by stating that the treatment furnished by Dr. Brooks was done on an emergency basis, and by contending that the statutory limitation on presentation of medical testimony was unconstitutional. With regard to any constitutional arguments, I advised the parties that, as a judge of compensation claims, I could not adjudicate the constitutionality of a statute. Sasso v. Ram Property Management, 431 So. 2d 204 (Fla. 1st DCA 1983), approved on other grounds 452 So. 2d 932 (Fla. 1984), appeal dism'd 469 U. S. 1030, 105 S. Ct. 498 (1984). Therefore, any constitutional arguments would have to be presented to an appropriate forum.

4. As concerns the other arguments for admitting the medical opinions of these two witnesses, the circumstances in this case resemble those as reported in Union Camp Corp. v. Hurst, 696 So. 2d 873 (Fla. 1st DCA 1997), in which an injured worker went on his own to see a physician without seeking prior authorization, and then attempted to introduce testimony from such physician(s) at trial. In the present case, no motion for independent medical examination (IME) was filed prior to trial, and no request for ruling on that issue was made until the date of hearing. As stated by the appellate court in Union Camp:

> The claimant was under an affirmative obligation to request an IME under section

440.13(5)(e), Florida Statutes (Supp. 1994), by the physician of his choice, if he objected to the e/c's decision to controvert his request for benefits based upon the opinions rendered in the independent medical evaluations obtained by the e/c. (citation omitted)

When the claimant in Union Camp attempted to introduce testimony from a health care provider who did not fall into one of the statutorily permitted categories listed in section 440.13(5)(e) of the Florida Statutes, the appellate court ruled that such witness could not properly testify, even though the panel noted that the claimant would have been "entitled to obtain such IME at the expense of the e/c" upon proper request. Similarly, in the present case, even if the claimant receives medical treatment in an emergency setting, and the e/c objects to the introduction of testimony from the physicians whose opinions the claimant seeks to have admitted into evidence, the claimant has an affirmative obligation to request an IME in a timely manner in order to qualify one or more physicians to express opinions on the issue in dispute. When the claimant does not seek a ruling on a request for IME prior to trial, and does not present good cause for the failure to do so, any such request must be considered to have been waived, if the guidelines set out in Union Camp are to be followed.

***

5. Without either Dr. Brooks or Dr. Gaudier qualified as an independent medical examiner, and as neither physician fits the other criteria in Section 440.13(5)(e), Fla.Stat. (1995), there is no medical opinion testimony to support the claimant's position on causation.

***

WHEREFORE, based upon the foregoing findings of fact, the following represents the conclusions of law for these proceedings:

1. The Petition for Benefits must be, and is hereby, denied and dismissed.

DONE AND ORDERED at Gainesville, Alachua County, Florida this 10th day of March, 1998

s/_____
JONATHAN D. OHLMAN
JUDGE OF COMPENSATION CLAIMS

I hereby certify that the foregoing order was entered on the 10th day of March, 1998, and that a conformed copy was sent on that date by U. S. Mail to the parties and counsel of record at their record addresses.

____/s_____
SECRETARY TO JUDGE OHLMAN

APPENDIX "B"

Decision of the District Court of Appeal, First District, State of Florida, filed April 1, 1999 as to Petitioner Bryant

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IS FILED

JEFF BRYANT,
Appellant

v. CASE NO. 98-1430

GOLDEN FLAKE SNACK FOODS, INC. and LIBERTY MUTUAL
Appellees.

_____/

Opinion filed April 1, 1999.

An appeal from Order of Judge of Compensation Claims.

Jonathan D. Ohlman, Judge.

Michael B. Staley , Ocala, for Appellant.

Mark A. Massey of McCarty, Helm, Keeter, Marion, Davis & O'Connor, P.A., Ocala, for Appellees.

PER CURIAM. AFFIRMED

ERVIN, ALLEN AND DAVIS, JJ., CONCUR.

APPENDIX "C"

Order of the District Court of Appeal, First District, State of Florida, denying Rehearing as to Petitioner Bryant

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DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

May 3, 1999

CASE NO.: 1998-1430
L. T. No.: 261-29-2926

Jeff Bryant v. Golden Flake Snack Foods, Inc. And Liberty Mutual

---

Appellant/Petitioner(s) Appellee/Respondent(s)

BY ORDER OF THE COURT:

Appellant's motion filed April 16, 1999, for rehearing or clarification is denied.

I HEREBY CERTIFY that the foregoing is (a true copy) of the original court order.

_____/s_____

JON S. WHEELER, CLERK [SEAL]

Served:

Michael B. Staley Mark A. Massey

APPENDIX "D"

Excerpt of Order of Judge of Compensation Claims, Hon. Jonathan D. Ohlman, dated March 5, 1998 as to Petitioner Gunter.

STATE OF FLORIDA
OFFICE OF THE JUDGE OF
COMPENSATION CLAIMS
DISTRICT "B"

EMPLOYEE:	ATTORNEY FOR CLAIMANT:
WILLIAM GUNTER	MICHAEL B. STALEY, ESQ.
2201 N.C. 37th Street	Post Office Box 4163
Ocala, Florida 34479	Ocala, FL 34478

EMPLOYER:	ATTORNEY FOR E/C/SA:
City of Belleview	ALAN D. KALINOSKI, ESQ.
5343 SE Abshier Blvd.	Post Office Box 2928
Belleview, Florida 34420	Orlando, Florida 32802

CARRIER:	
Florida League of Cities	CLAIM NO.: 267-74-2994
Post Office Box 538135	
Orlando, Florida 32853	D/ACC: 12/3/95

ORDER

AFTER PROPER NOTICE TO ALL PARTIES, a trial was held on this claim in Ocala, Marion County, Florida on October 23, 1997, before the Honorable Jonathan D. Ohlman, Judge of Compensation Claims.

***

With regard to the claims for a psychiatric independent medical examination (IME) by Dr. Cerra and for authorization of psychiatric care, it is important to note the sequence of events. The claim for psychiatric IME was included among the claims on a Petition for Benefits, dated 10-15-96, as well as being listed on the pre-trial stipulation form, which was signed on behalf of the Claimant on 12-30-96. Counsel for the Claimant acknowledged at the beginning of trial that no motion for IME had ever been filed, and that the request for a psychiatric IME had never been called for hearing prior to the date of trial. It is further significant that, upon request of the Employer/Carrier, the trial was continued from the originally scheduled date of 2-7-97 to 10-23-97. However, for reasons not fully explained before or at trial, no motion was filed and no request was ever made prior to the date of trial for any hearing or ruling on the request for a psychiatric IME. As in the case of Union Camp Corp. v. Hurst, 696 So. 2d 873 (Fla. 1st DCA 1997), the Claimant went on his own to see a physician (Dr. Cerra, a local psychiatrist) without seeking prior authorization, and then attempted to introduce testimony from that physician at trial. Again, although there was a request for a psychiatric IME on the pre-trial stipulation, no motion was filed and no request for ruling on that issue was made until the date of hearing. As stated by the appellate court in Union Camp:

> The claimant was under an affirmative obligation to request an IME under section 440.13(5)(e), Florida Statutes (Supp. 1994), by the physician of his choice, if he objected to the e/c's decision to controvert his request for benefits based upon the opinions rendered in the independent medical evaluations obtained by the e/c. (Citation omitted).

When the Claimant in Union Camp attempted to introduce testimony from a health care provider who did not fall into one of the statutorily permitted categories listed in Section

440.13 (5)(e) of the Florida Statutes, the appellate court ruled that such witness could not properly testify, even though the panel noted that the claimant would have been "entitled to obtain such IME at the expense of the e/c" upon proper request. Similarly, in the present case, even if the claimant makes it known that he requests an IME, when the claimant does not seek a ruling on a request for IME prior to trial, and does not present good cause for the failure to do so, any such request must be considered to have been waived. Otherwise the trial would have to be continued after all parties and witnesses had appeared at the forum, and the legislative intent to facilitate the "prompt and cost-effective delivery of payments" will be unnecessarily frustrated and delayed.

***

Nevertheless, under the circumstances presented, I find that the request by the Claimant for a psychiatric IME has been waived by the failure to seek a ruling on that request prior to the date of trial. With that waiver, the objection of the E/SA to the testimony of Dr. Cerra must be sustained, and the medical opinions of Dr. Cerra must be excluded from consideration as he does not fall into a statutorily permitted category of medical witnesses. Without such testimony for Dr. Cerra, the record does not contain competent and substantial evidence to support a determination that the subject incident was the major contributing cause of any psychiatric injury; to support a determination by "clear and convincing evidence," to use the language of Section 440.09(1) of the Florida Statutes, that any mental or nervous injury sustained by the Claimant was compensable; or to support the claim for authorization of psychiatric care and treatment. Accordingly, the claims for such must be denied.

***

WHEREFORE, based upon the foregoing findings of fact, the following represent the conclusions of law for these proceedings:

***

4. Authorization of a psychiatrist is denied.
5. Authorization of a psychiatric IME is denied.

***

DONE AND ORDERED in Chambers at Gainesville, Alachua County, Florida.

_S/_____
JONATHAN D. OHLMAN
JUDGE OF
COMPENSATION CLAIMS

THIS IS TO CERTIFY that on March 5th, 1998, the above Order was entered in the office of the Judge of Compensation Claims, and a copy was mailed to each party and counsel at the address listed above.

__s/_____
Judicial Assistant

APPENDIX "E"

Decision of the District Court of Appeal, First District, State of Florida, filed April 12, 1999 as to Petitioner Gunter

IN THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IS FILED

WILLIAM GUNTER,
Appellant

V.

CASE NO. 98-1386

CITY OF BELLEVIEW POLICE DEPARTMENT and FLORIDA LEAGUE OF CITIES, INC.,
Appellees.

_____/

Opinion filed April 12, 1999.
An appeal from Order of Judge of Compensation Claims.
Jonathan D. Ohlman, Judge.
Michael B. Staley of Michael B. Staley & Associates, P.A., Ocala, for Appellant.
Lamar D. Oxford of Dean, Ringers, Morgan & Lawton, Orlando, for Appellees.
PER CURIAM. AFFIRMED.
ERVIN, ALLEN and DAVIS, JJ., CONCUR.

APPENDIX "F"

Order of the District Court of Appeal, First District, State of Florida, denying Rehearing as to Petitioner Gunter

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DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

May 4, 1999

CASE NO.: 1998-1386
L. T. No.: 267-74-2994

William Gunter v. City of Belleview Police Dept And Fl League Etc.

Appellant/Petitioner(s) Appellee/Respondent(s)

BY ORDER OF THE COURT:

Appellant's motion filed April 20, 1999, for rehearing or clarification is denied.

I HEREBY CERTIFY that the foregoing is (a true copy) of the original court order.

_____/s_____

JON S. WHEELER, CLERK [SEAL]

Served:

Michael B. Staley/Alan D. Kalinoski/
Lamar D. Oxford

APPENDIX "G"

Excerpts from Petitioner Bryant's Initial Brief in the District Court of Appeal, First District, State of Florida

***

ARGUMENT

I

§ 440.15, FLA. STAT. (1994) VIOLATES THE DUE PROCESS, EQUAL ACCESS TO COURTS AND EQUAL PROTECTION OF LAWS PROVISIONS OF THE FLORIDA CONSTITUTION.

II

§ 440.13(5)(e), FLA. STAT. (1994) IS UNCONSTITUTIONAL IN ITS RESTRICTION OF MEDICAL TESTIMONY

III

§ 440.45(2), FLA. STAT. (1994) IS UNCONSTITUTIONAL TO THE EXTENT THAT IT VIOLATES ART. II, § 3 OF THE FLORIDA CONSTITUTION AS WELL AS THE DUE PROCESS CLAUSE OF ART. I, § 9 OF THE FLORIDA CONSTITUTION.

APPENDIX "H"

Excerpt of Petitioner Gunter's Initial Brief in the District Court of Appeal, First District, State of Florida

***

ARGUMENT

I

§ 440.15, FLA. STAT. (1994) VIOLATES THE DUE PROCESS, EQUAL ACCESS TO COURTS AND EQUAL PROTECTION OF LAWS PROVISIONS OF THE FLORIDA CONSTITUTION

II

§ 440.13(5)(E), FLA. STAT. (1994) IS UNCONSTITUTIONAL IN ITS RESTRICTION OF MEDICAL TESTIMONY

III

§ 440.45(2), FLA. STAT. (1994) IS UNCONSTITUTIONAL TO THE EXTENT THAT IT VIOLATES ART. II, § 3 OF THE FLORIDA CONSTITUTION AS WELL AS THE DUE PROCESS CLAUSE OF ART. I, § 9 OF THE FLORIDA CONSTITUTION.

APPENDIX "I"

Excerpts of Florida Statutes, 1989

440.02. Definitions

When used in this chapter, unless the context clearly requires otherwise, the following terms shall have the following meanings:

***

(21) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, together with the reasonable value of board, meals, rent, housing, lodging, parking; employer contributions for uniforms or cleaning allowances; employer contributions for legal, life, health, accident, or disability insurance for the employee or dependents, excluding social security benefits; contributions to pension plans to the extent that the employee's rights have vested; any other consideration received from the employer that is considered income under the Internal Revenue Code in effect on January 1, 1987; and gratuities received in the course of employment from others than the employer, only when such gratuities are received with the knowledge of the employer. In employment in which an employee receives consideration other than cash as a portion of this compensation, the reasonable value of such compensation shall be the actual cost to the employer.

***

440.14. Determination of pay-

(1) Except as otherwise provided in this chapter, the average weekly wages of the injured employee at the time of

the injury shall be taken as the basis upon which to compute compensation and shall be determined, subject to the limitations of s. 440.12(2), as follows:

(a) If the injured employee has worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of 13 weeks immediately preceding the injury, his average weekly wage shall be one-thirteenth of the total amount of wages earned in such employment during the 13 weeks.

***

440.15. Compensation for disability.

Compensation for disability shall be paid to the employee, subject to the limits provided in s. 440.12(2), as follows:

***

(2) Temporary total disability.--

(a) In case of disability total in character total in character but temporary in quality, 66 2/3 percent of the average weekly wages shall be paid... not to exceed 350 weeks except as provided in s. 440.12(1).

***

(3) Permanent impairment and wage-loss benefits.--

***

(b) Wage-loss benefits.

1. Each injured worker who suffers any permanent impairment, which permanent impairment is determined pursuant to the schedule adopted in accordance with subparagraph (a) 3., may be entitled to wage-loss benefits under this subsection. Such benefits shall be based on actual wage loss and shall not be subject to the minimum compensation rate set forth in s. 440.12(2). Subject to the maximum compensation rate as set forth in s. 440.12 (2),

such wage-loss benefits shall be equal to 95 percent of the difference between 85 percent of the employee's average monthly wage and the salary, wages, and other remuneration the employee is able to earn after reaching maximum medical improvement, as compared monthly; however, the monthly wage-loss benefits shall not exceed an amount equal to 66 2/3 percent of the employee's average monthly wage at the time of the injury. In order to simplify the comparison of the preinjury average monthly wage with the salary, wages, and other remuneration the employee is able to earn after reaching maximum medical improvement, the division may by rule provide for the modification of the monthly comparison so as to coincide as closely as possible with the injured worker's pay periods.

***

3. The right to wage-loss benefits shall terminate:

***

c. For injuries occurring after July 1, 1980, 525 weeks after the injured employee reaches maximum medical improvement, whichever comes first.

***

APPENDIX "J"

Excerpts of Florida Statutes (1994 Supp.)

440.13 Medical Services and Supplies; Penalty for Violations; Limitations

(1) DEFINITIONS. – As used in this section, the term:

***

(j) "independent medical examiner" means a physician selected by either an employee or a carrier to render one or more independent medical examinations in connection with a dispute arising under this chapter.

***

(2) MEDICAL TREATMENT; DUTY OF EMPLOYER TO FURNISH.---

***

(c) If the employer fails to provide treatment or care required by this section after request by the injured employee, the employee may obtain such treatment at the expense of the employer, if the treatment is compensable and medically necessary. There must be a specific request for the treatment, and the employer or carrier must be given a reasonable time period within which to provide the treatment or care. However, the employee is not entitled to recover any amount personally expended for the treatment or service unless he has requested the employer to furnish that treatment or service and the employer has failed, refused, or neglected to do so within a reasonable time or unless the nature of the injury requires such treatment, nursing, and services and the employer or his superintendent or foreman,

having knowledge of the injury, has neglected to provide the treatment or service.

***

(3)

PROVIDER ELIGIBILITY; AUTHORIZATION.---

(a) As a condition to eligibility for payment under this chapter, a health care provider who renders services must be a certified health care provider and must receive authorization from the carrier before providing treatment. This paragraph does not apply to emergency care. the division shall adopt rules to implement the certification of health care providers. As a one-time prerequisite to obtaining certification, the division shall require each physician to demonstrate proof of completion of a minimum 5-hour course that covers the subject areas of cost containment, utilization control, ergonomics, and the practice parameters adopted by the division governing the physician's field of practice.

***

(5) INDEPENDENT MEDICAL EXAMINATIONS. --

(a) In any dispute concerning overutilization, medical benefits, compensability, or disability under this chapter, the carrier or the employee may select an independent medical examiner. The examiner may be a health care provider treating or providing other care to the employee. An independent medical examiner may not render an opinion outside his area of expertise, as demonstrated by licensure and applicable practice parameters.

***

(e) No medical opinion other than the opinion of a medical advisor appointed by the judge of compensation claims or division, an independent medical examiner, or an authorized treating provider is admissible in proceedings before the judges of compensation claims.

(f) Attorney's fees incurred by an injured employee in connection with delay of or opposition to an independent medical examination, including, but not limited to, motions for protective orders, are not recoverable under this chapter.

440.45 Office of Judges of Compensation.

***

(2) (a) The Governor shall appoint full-time judges of compensation claims to conduct proceedings as required by this chapter or other law.

***

(b) The Governor shall initially appoint a judge of compensation claims from a list of three persons nominated by a statewide nominating commission.

***

(c) Each judge of compensation claims shall be appointed for a term of 4 years, but during the term of office may be removed by the Governor for cause. Prior to the expiration of a judge's term of office, the statewide nominating commission shall review the judge's conduct. The commission shall report its finding to the Governor no later than 6 months prior to the expiration of the judge's term of office. The report of the commission shall include a list of three candidates for appointment. The candidates shall include the judge whose term is expiring, if that judge desires reappointment and the judge's performance is

satisfactory upon review by the commission. If a vacancy occurs during a judge's unexpired term, the commission shall issue a report to the Governor which includes a list of three candidates for appointment. The Governor shall review the commission's report, and may select one of the listed candidates. If no candidate is selected, the Governor shall so inform the commission, which shall within 2 months issue a report to the Governor which includes a list of three different candidates for appointment.

***

APPENDIX "K"

Excerpts of Florida Statutes (1998 Supp.)

440.02 . Definitions - When used in this chapter, unless the context clearly requires otherwise, the following terms shall have the following meanings:

***

(27) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury and includes only the wages earned and reported for federal income tax purposes on the job where the employee is injured and any other concurrent employment where he or she is also subject to workers' compensation coverage and benefits, together with the reasonable value of housing furnished to the employee by the employer which is the permanent year-round residence of the employee, and gratuities to the extent reported to the employer in writing as taxable income received in the course of employment from others than the employer and employer and employer contributions for health insurance for the employee or the employee's dependents.

***

440.15

***

(2) TEMPORARY TOTAL DISABILITY.-

(a) In case of disability total in character but temporary in quality, 66 2/3 percent of the average weekly wages shall be paid to the employee during the continuance thereof, not to exceed 104 weeks except as provided in this subsection, s. 440.12(1), and s. 440.14(3). Once the employee reaches the maximum number of weeks allowed,

or the employee reaches the date of maximum medical improvement, whichever occurs earlier, temporary disability benefits shall cease and the injured worker's permanent impairment shall be determined.

***

(3) PERMANENT IMPAIRMENT AND WAGE-LOSS BENEFITS. –

(a) Impairment benefits.---

***

3. All impairment income benefits shall be based on an impairment rating using the impairment schedule referred to in subparagraph 2. Impairment income benefits are paid weekly at the rate of 50 percent of the employee's average weekly temporary total disability benefit not to exceed the maximum weekly benefit under s. 440.12. An employee's entitlement to impairment income benefits begins the day after the employee reaches maximum medical improvement or the expiration of temporary benefits whichever occurs earlier, and continues until the earlier of:
   a. The expiration of a period computed at the rate of 3 weeks for each percentage point of impairment; or
   b. the death of the employee.

440.45 Office of the Judges of Compensation Claims.-

***

(2)(a) The Governor shall appoint full-time judges of compensation claims to conduct proceedings as required by this chapter or other law.

***

(b) Except as provided in paragraph (c), the Governor shall appoint a judge of compensation claims from a list of three persons nominated by a statewide nominating commission.

***

(c) Each judge of compensation claims shall be appointed for a term of 4 years, but during the term of office may be removed by the Governor for cause. Prior to the expiration of a judge's term of office, the statewide nominating commission shall review the judge's conduct and determine whether the judge's performance is satisfactory. If the judge's performance is deemed satisfactory, the commission shall report its finding to the Governor no later than 6 months prior to the expiration of the judge's term of office. The Governor shall review the commission's report and may reappoint the judge for an additional 4-year term. If the Governor does not reappoint the judge, the Governor shall inform the commission. The judge shall remain in office until the Governor has appointed a successor judge in accordance with paragraphs (a) and (b). If a vacancy occurs during a judge's unexpired term, the statewide nominating commission does not find the judge's performance is satisfactory, or the Governor does not reappoint the judge, the Governor shall appoint a successor judge for a term of 4 years in accordance with paragraph (b).

***